

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON , D.C. 20240

December 23, 1998

In Reply Refer To:
4100/1790 (220) N
Ref. IM No. 98-91 & 99-023

EMS TRANSMISSION 01/07/99
Instruction Memorandum No. 99-039
Expires: 9/30/00

To: All Field Officials

From: Assistant Director, Renewable Resources and Planning

Subject: Issuance of Grazing Permits in Compliance with Applicable Laws,
Regulations and Policy DD: 01/31/99

I. Introduction

A confluence of events affecting the Bureau of Land Management's (BLM) rangeland management program requires that we pursue an integrated approach to processing grazing permits and leases (herein referred to as permits). We must complete the implementation of the Bureau's Healthy Rangelands Initiative and comply with the Fundamentals and Standards of Range Health (published 2/22/95 in 43 CFR ' 4180, herein referred to as Section 4180). Additionally, we face a major workload in processing approximately 4,500 permits that will expire during FY 1999 and 1,900 in FY 2000 (and processing hundreds of permit transfers). Furthermore, in its ruling on Comb Wash (National Wildlife Federation, et al., v. Bureau of Land Management 140 IBLA 85) the Interior Board of Land Appeals (IBLA) gave us a strong reminder of our responsibility for ensuring that all management actions on public land conform with the appropriate land use plans (LUP) completed under the provisions of the Federal Land Policy and Management Act (FLPMA), and are in compliance with the National Environmental Policy Act (NEPA).

The memo supplements W.O. Instruction Memorandum No. 99-023 to provide further guidance for implementing a Bureau-wide strategy, consistent with laws and regulations, for processing grazing permits and leases. Each permit or lease considered for transfer, renewal, modification, or other issuance must be reviewed to determine if it conforms with the appropriate LUP and NEPA documents. Compliance with other applicable public laws such as the Taylor Grazing Act, Endangered Species Act (ESA), the Clean Water Act, Wild and Scenic Rivers Act, and BLM regulations and policies for managing land and resources is also mandatory in issuance of grazing permits.

In addition, compliance with these laws and regulations is necessary to ensure that grazing is authorized in a multiple-use context. We must use the most up-to-date information available because resource conditions may have changed or new information may have come to light since the completion of the livestock grazing environmental impact statements (EIS) or the development of other LUPs/EISs.

In the event that the processing of a permit cannot be completed by the start of the 1999 grazing season, the permit shall be renewed for the balance of fiscal year 1999 on the same terms and conditions as contained in the expiring permits, or until the BLM completes processing of the permit in compliance with applicable laws, whichever comes first. (See Interior Appropriations, in Attachment 1).

II. Strategy

The strategy for timely and complete processing of grazing permits consistent with the implementation of the Bureau's Healthy Rangelands Initiative consists of a number of steps that must be taken consistently on a bureauwide basis.

State Directors and Field Managers are required to:

1. Develop an implementation work plan that integrates your response to W.O. IM-98-91, and incorporates the concepts of the framework document (W.O. IM 99-023). Consolidate schedules by state and submit to the Director (WO-220) by January 31, 1999. Detailed requirements for this work plan are presented below.
2. Ensure that no grazing is authorized without a permit.
3. Ensure that there is adequate NEPA documentation and compliance with applicable laws and regulations before renewing permits. (see Attachment 3)
4. Ensure early and frequent contact with the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) to plan and coordinate the ESA Section 7 consultation workload.
5. Issue permits as mandated by Section 124 of Public Law Number 105 - 277 (Interior Appropriation for FY 1999 in Omnibus Consolidated and Emergency Supplemental Appropriations Act) to authorize grazing from the start of the 1999 grazing season until September 30, 1999, or until completion of the processing of the permit in compliance with all applicable laws, whichever comes first. (see Attachment 1).

6. Submit state-consolidated progress reports to the Director WO-220. Your first monthly progress report should accompany the Work Plan to be submitted by January 31, 1999. (Attachment 4).

1. Work Plan

Field offices are directed to prepare a work plan for FY 1999 and FY 2000 that must include a clear and justified rationale for the selection of priorities and your strategy for accomplishing the tasks. The work plan should reflect your best efforts to complete permit renewals and standard and guideline assessments in a timely manner. The work plan is to address priorities and schedules for: 1) processing expiring grazing permits, and 2) conducting rangeland health assessments. Include a consideration of how processing unanticipated transfers will be handled. Guidance and general criteria for setting priorities have been provided previously for standard and guideline assessment in W.O. IM 98-91 and for permit renewal in W.O. IM 99-023. Work plans developed in response to this Instruction Memorandum should clearly document the specific criteria used to set your priorities for completing grazing permit renewal and standards and guidelines assessment, and should document the results of applying your criteria. In many cases, field offices have completed this priority setting process; in these instances the process and results should be reviewed to ensure that they are clearly documented.

Following a description of your general plan and the criteria employed, the work plan should contain information on specific allotments, watersheds or other geographic areas subject to permit renewal and/or S&G assessment in FY 1999 and 2000 and document:

Allotment/Watershed Name,
 Field Office priority ranking,
 Formal assessment of S&Gs (Y or N)
 if Ano@, indicate the date scheduled for assessment,
 ESA consultation required (Y or N),
 Permit expiration date,
 Grazing season (dates),
 Work initiated (date),
 Number of permits involved,
 Acres of public land addressed, and
 Rationale (how criteria applied to this specific area)

It is recognized that priorities can shift and the work plan should be updated regularly to indicate any change in priorities or schedules.

2. Other Agency Contacts: If you haven't already done so, immediately advise the Fish and Wildlife Service (FWS) and/or the National Marine Fisheries Service (NMFS) of your estimated number of permits and allotments requiring consultation under the Endangered Species Act during this fiscal year. Your contact should also cover the consultation needs and expectations. Continue to update FWS and NMFS as you refine your work plan and priorities.

Contacts should also be made with the State Historic Preservation Officer, as appropriate, to provide information on potential consultation requirements resulting from grazing permit renewals.

Attachment 3 to this memorandum discusses further the need to consult with other agencies.

3. Public Input into Work Plan: The work plan is a crucial element for you and the public. You should involve your Resource Advisory Councils (RACs) in the development of your prioritization and scheduling of work, and keep your interested publics and affected interest informed.

III. Suggestions for Implementation

Following are some suggestions for your consideration that may facilitate efficient use of resources in processing grazing permits:

1. Consider grouping allotments when practical for programmatic analysis, for example by: groups of allotments having similar watershed, landscapes, resource or habitat values, T & E or special status species, etc., to increase efficiency and productivity.
2. Include high priority permits with other (non-grazing) high priority work, for example:
T&E
consultation
s, regional
plan
implementat
ion, or water
quality
review.
3. State Directors should consider holding a joint program meeting between the Rangeland Management Specialists, fish and wildlife specialists, Field Office Managers, NEPA coordinators and Regional Solicitors to discuss your specific state-s situation regarding issues such as the extent to which you can tier analyses of permit renewals to existing land use plans, EISs and other programmatic documents, and the

strategies you will develop to ensure compliance with NEPA, FLPMA and other laws.

4. State Directors should consider establishing State guidance or policy, and common formats to be used in evaluating existing permits/allotments/areas. Any such guidance must include the requirement to review both multiple-use considerations and potential environmental impacts through the use of interdisciplinary teams that appropriately reflect the involved issues and concerns.

5. Detail staff within Field Offices (FO) or between offices within the state to provide skills and work forces to complete the work.
6. Utilize the National Applied Resource Sciences Center (NARSC, RS-100) technical staff to assist in data analysis, literature searches, etc. in addressing topics such as special status species, water quality, cultural resources, or responses of vegetation to land uses. In addition, NARSC has a cadre of personnel representing many of the scarce skills within the Bureau. The Fish, Wildlife and Forestry Group (WO-230) can provide guidance concerning policy, regulatory and legal requirements related to special status species, habitat management, and compliance with the Endangered Species Act.
7. Contract work (with appropriate oversight) or use seasonal employees to free up staff for processing permits. Examples of work that may be contracted include: inventory, data collection, or preparation of NEPA documents. Seasonal employees might be retained to carry out administrative duties, conduct use supervision in some locations, and carry out other duties that allow interdisciplinary team members to focus on analysis, documentation, consultation and other aspects of processing permits.
8. Consider opportunities for accomplishing work through volunteers or allowing ranchers or their consultants to do some of the rangeland workloads or NEPA assessment (with BLM policy direction, and required review and approval).

IV. Accountability

State Directors and Field Managers will be accountable for developing sound, rationale plans for addressing grazing permit renewal and standard and guideline assessment in FY 1999 and FY 2000, and for making substantial and measurable progress in implementing these plans.

States will be required to report their progress in issuing permits to the Director (AD 200) on a monthly basis in the attached format. (See Attachment 4).

Questions concerning this memorandum should be addressed to George Ramey, WO Rangeland Management Specialist, 202-452-7747, or Mark Stiles, Grazing Permit Renewal Task Force Lead, 970-240-5375.

Signed by:

Henri R. Bisson

Assistant Director

Renewable Resources and Planning

Authenticated by:

Robert M. Williams

Directives, Records

& Internet Group, WO540

4 Attachments

- 1 - Interior Appropriation for FY 1999 (5 pp)
- 2 - Questions and Answers (6 pp)
- 3 - Selected Laws Relating to (9 pp)
- 4 - Reporting Permit Renewals (2 pp)

Attachment 1

Interior Appropriation for FY 1999 - Section 124 of Public Law Number 105 - 277 (The Grazing Rider)

The Appropriations Act for FY 1999 included a provision to give BLM more time to complete the permit renewal workload for permits expiring in FY 99. The provision applies in situations where the grazing permits may expire before the next turn out date and BLM has not yet processed the permit renewal. It essentially gives you seven additional months (from typical turnout or permit date of March 1, 1999 to Sept. 30, 1999) to document compliance with NEPA, ESA, CWA, and other laws and regulations as you renew permits to extend past 1999. Section 124 of Public Law 105-277 states:

Section 124: Notwithstanding any other provision of law, grazing permits which expire during fiscal year 1999 shall be renewed for the balance of fiscal year 1999 on the same terms and conditions as contained in the expiring permits, or until the Bureau of Land Management completes processing of these permits in compliance with all applicable laws, whichever comes first. Upon completion of processing by the Bureau, the terms and conditions of existing permits may be modified, if necessary, and reissued for a term not to exceed ten years. Nothing in this language shall be deemed to affect the Bureau's authority to otherwise modify or terminate grazing permits.

If you are unable to issue a long-term permit before the start of 1999 grazing year, you should:

- (1) Generate a permit as required by Public Law 105-277 (the Pub. L. 105-277 permit) which includes the same terms and conditions of the expiring permit except for the expiration date which shall be 9/30/99.
- (2) Transmit the Pub. L. 105-277 permit with a letter that explains that the renewal of the permit is mandatory under Section 124 of Public Law Number 105-277. (See examples of transmittal letter). Include the grazing bill if billing prior to grazing use is the appropriate billing method.
- (3) In the cases where billings are transmitted with the permit, do not bill the permittee for grazing beyond the permit expiration date of 9/30/99. If billing is by actual use, the permittee should submit his actual use at the end of the grazing season, which may be either September 30, 1999 or later, if after the proper administrative processes the BLM extends the permit past September 30, 1999.
- (4) It is not necessary to document compliance with NEPA, ESA, or other laws or regulations before you issue the Pub. L. 105-277 permit.

(5) BLM will not process protest or appeals for Pub. L. 105-277 permits because the issuance of the permits is mandated by law. This is explained to the permittees in the attached transmittal letters.

(6) If you complete the renewal of the long-term permit prior to Sept. 30, 1999, you should issue the decision and permit under the provisions of 43 CFR Part 4100. At the time the final decision is effective, it will supersede the Pub. L. 105-277 permit.

(See examples of transmittal letters - Attachment 1 A)

Attachment 1 A

Transmittal Letter Examples:

FIELD OFFICE LOGO

In Reply Refer To:
Office Code
Grazing permit\lease No.
4130

Permittee/lessee Name
Permittee/lessee address

Dear ,

{1. If advanced billing is used (payment due on date specified and prior to grazing use).....go to A

2. If after-the-grazing-season billing is used (fees based on actual use and due upon issuance).....go to B}

A.....Your grazing permit\lease No.____ has expired. The Bureau of Land Management is currently taking actions required to process the renewal your permit\lease, but to date, has not completed these necessary actions. Because we have not completed these actions, we are issuing you a grazing permit/lease as mandated by Section 124 of Public Law 105-277 (Omnibus Consolidated and Emergency Supplemental Appropriations Act) which will expire on September 30, 1999 (the Pub. L. 105-277 permit). That law states:

ANotwithstanding any other provision of law, grazing permits which expire during fiscal year 1999 shall be renewed for the balance of fiscal year 1999 on the same terms and conditions as contained in the expiring permits, or until the Bureau of Land Management completes processing of these permits in compliance with all applicable laws, whichever comes first. Upon completion of processing by the Bureau, the terms and conditions of existing permits may be modified, if necessary, and reissued for a term not to exceed ten years. Nothing in this language shall be deemed to affect the Bureau's authority to otherwise modify or terminate grazing permits.@

This Pub. L. 105-277 permit contains the same terms and conditions as in your expiring permit, except for the expiration date which is September 30, 1999. If we complete processing the renewal of your permit, we may put a final decision into effect before September 30, 1999, which would supersede the Pub. L. 105-277 permit.

Attachment 1-3

Please note that you are obligated to follow the terms and conditions in this short term permit and all regulations concerning grazing use on the public lands.

Because Pub. L. 105-277 mandates us to issue you this permit, the BLM will not process any protests or appeals of this permit.

We will contact you as we begin work on the renewal of your permit, and we look forward to your input in the renewal process.

Fees are due on the date specified on the enclosed billing statement. Payment must be made prior to grazing use.

If you have any questions, contact (who) at the address above.

Sincerely,

Field Manager
F.O. name

CC. Interested publics

B.....Your grazing permit\lease No._____ has expired. The Bureau of Land Management is currently taking actions required to process the renewal your permit\lease, but to date, has not completed these necessary actions. Because we have not completed these actions, we are issuing you a permit/lease as mandated by Section 124 of Public Law 105-277 (Omnibus Consolidated and Emergency Supplemental Appropriations Act) which will expire on September 30, 1999 (the Pub. L. 105-277 permit). That law states:

ANotwithstanding any other provision of law, grazing permits which expire during fiscal year 1999 shall be renewed for the balance of fiscal year 1999 on the same terms and conditions as contained in the expiring permits, or until the Bureau of Land Management completes processing of these permits in compliance with all applicable laws, whichever comes first. Upon completion of processing by the Bureau, the terms and conditions of existing permits may be modified, if necessary, and reissued for a term not to exceed ten years. Nothing in this language shall be deemed to affect the Bureau's authority to otherwise modify or terminate grazing permits.@

This Pub. L. 105-277 permit contains the same terms and conditions as in your expiring permit, except for the expiration date which is September 30, 1999. If we complete processing the renewal of your permit, we may put a final decision into effect before September 30, 1999, which would supersede the Pub. L. 105-277 permit.

Please note that you are obligated to follow the terms and conditions in this short term permit and all regulations concerning grazing use on the public lands.

Because Pub. L. 105-277 mandated us to issue you this permit, the BLM will not process any protests or appeals.

We will contact you as we begin work on the renewal of your permit, and we look forward to your input in the renewal process.

Actual use must be submitted as specified in the terms and conditions of your AMP. Upon receipt of actual use, BLM will issue a billing statement. Fees will be based on the use submitted and are due upon issuance.

If you have any questions, contact (who) at the address above.

Sincerely,

Field Manager
F.O. name

CC. Interested publics

Attachment 1-5

ATTACHMENT 2

Question and Answers.

Question 1: Is completing a NEPA analysis prior to authorizing a grazing permit or lease (other than Pub. L 105-277 permits) discretionary?

Answer: Before issuing a grazing permit or lease, you must either document an administrative determination that the existing NEPA analysis is sufficient or prepare an EA or EIS for the grazing permit or lease. This IM outlines existing procedures on how to comply with the requirements of NEPA and other Public Laws, regulations and Policy in authorizing livestock grazing on public rangelands. Refer to BLM Handbook H-1790-1, 40 CFR 1500 - 1508 and Public Law 105-277 section 124 (as discussed earlier in this memo) for additional NEPA guidance.

Question 2: What is tiering and when is it appropriate?

Answer: Tiering occurs when a narrower NEPA analysis incorporates the general analysis in a broader NEPA document (See 40 CFR 1502.20). This allows the narrower analysis, such as an EA for a grazing permit, to concentrate solely on the site-specific issues related to that permit. Tiering is appropriate when preparing a site-specific grazing permit EA which incorporates by reference the general discussions from a more general NEPA analysis, such as a grazing EIS, RMP EIS, or NEPA analysis for an allotment management plan. Incorporation by reference should briefly describe the general analysis and provide specific citation to where the analysis is contained in the broader NEPA document (SEE 40 CFR 1502.21).

No tiering occurs when the existing NEPA documents are sufficient to support your decision on the grazing permit. In this case an administrative determination documents that a subsequent NEPA analysis is not needed because the necessary analysis is contained in existing NEPA documents.

Question 3: Do *Standards for Rangeland Health and Guidelines for Livestock Grazing* (S&Gs) need to be assessed on all allotments and grazing permits/leases at the time they are being renewed or transferred?

Answer: You should consider the renewal or transfer of a permit or lease to be an opportune time to conduct an assessment of rangeland health and make any needed changes in the terms and conditions. If you do not conduct an assessment of rangeland

health when a permit or lease is renewed or transferred, you must include terms and conditions that ensure achievement of the standards and conformance with appropriate guidelines. These terms and conditions must include a statement that if an assessment results in a determination that changes are necessary in order to comply with the standards and guidelines, the permit or lease will be reissued subject to revised terms and conditions.

However, the NEPA documentation for grazing permit renewal should include consideration of the concepts in the fundamentals of rangeland health (see Attachment 3). The consideration of these concepts in the NEPA documentation will not necessarily require or be comparable to an assessment of rangeland health, as discussed in IM 98-91.

Question 4: The grazing permit for the allotment has expired and is scheduled for renewal in FY 99. According to the state 303(d) list, the stream in the allotment exceeds water quality standards for temperature. Are we required to make modifications to the grazing permit prior to reissuance?

Answer: If it is established that stream temperature exceeds state water quality standards, and it has been determined by the authorized officer that livestock grazing management is contributing significantly to the failure in meeting the standard, the authorized officer must take appropriate action by the start of the next grazing year that will result in significant progress toward achieving the standard. Modification to the terms and conditions of the permit is called for. (See 43 CFR 4180.2(c)). If the failure to meet the standard is established but no determination of cause has been made, there is no immediate requirement for permit modification. However, BLM has the responsibility of making the determination, in priority order, as established in the work plan developed for the implementation of Section 4180 under W.O. IM 98-91. In the event that livestock are an obvious cause of the failure to meet standards, corrective actions should be taken.

Question 5: How do I analyze a permit/lease renewal with more than one allotment on it?

Answer: Field Offices should determine for multiple allotment permits if one NEPA document would be the most efficient for all allotments or if individual NEPA documentation should be done for each allotment. In either case, the requirements for analysis presented elsewhere in this memorandum apply. It is anticipated that permits with multiple grazing allotments may have some allotments that will have a formal assessment of conformance with standards and guidelines and others may not, in accordance with field office priorities. Some allotments may require the development of further NEPA documentation while some may have sufficient existing documentation. Your NEPA document should clearly identify how each allotment has been considered.

Question 6: Can I renew a permit/lease for less than 10 years?

Answer: Yes, regulation 43 CFR 4130.2(d)(4) allows for permit renewal for less than ten years for cases where it is in the interests of sound land management. As an example, rangeland health assessment is scheduled in three years from the date of permit renewal. In this case, consider issuing a permit for three years with the understanding that it may be modified and reissued following the assessment. (Rationale for issuing a permit for less than 10 years should be clearly documented.) An option to this approach would be to issue a 10-year permit knowing that, should information collected subsequent to the renewal indicate changes in management are needed to ensure allotments or areas are meeting or making significant progress towards standards and conforming to guidelines, the permit may be modified any time during the 10-year period. Both approaches provide the opportunity, within regulation, to spread future expirations dates and thereby reduce the administrative Aspike® in numbers of permit renewals.

Question 7: What is the Administrative Procedure Act (APA) provision that I have heard discussed? How does it help me with my workload?

Answer: There has been discussion about whether the APA might operate to protect ranchers whose permits expire before BLM has an opportunity to process them appropriately. BLM has, in one instance, invoked this provision as its authority for allowing a rancher to continue to graze cattle on an allotment even though the permit expired and was never renewed in accordance with applicable law. BLM has been sued for this action. Even if the courts find that the APA operates to protect ranchers in this way, it clearly does not protect BLM from legal challenges for its failure to comply in a timely fashion with NEPA, the ESA, FLPMA, and other laws. Its use is an invitation for lawsuits and court ordered compliance schedules and BLM should not therefore assume that it is a remedy to its workload problem. In any case, the grazing rider in the FY 1999 Appropriations Bill (explained in Attachment !) eliminates the need for and the option of relying on the APA.

Question 8: Can we postpone renewal of a permit for 1 year to allow for completion of processing the permit and not authorize grazing?

Answer: No. However, if all necessary actions for permit renewal are not completed prior to the start of the next grazing season, pursuant to section 124 of Public Law Number 105 - 277 (Omnibus Consolidated and Emergency Supplemental Appropriations Act) you must issue a short term permit which includes the same terms and conditions stated in the expiring permit (lease). The duration of Pub. L. 105-277 permits shall not exceed September 30, 1999 or until the BLM completes processing of long term permit in compliance with all applicable laws, whichever comes first.

Question 9: Could NEPA analyzes for grazing permits be grouped by allotment or geographic area?

Answer: It may be appropriate to group into a single NEPA document, similar actions which have a common timing, geography, or effects. In general, you should consider grouping permits for analysis when grouping will provide a better basis for analyzing the combined impacts of similar permits. For example, grazing permits on allotments having similar resources and uses could be analyzed in a single, programmatic document. Grouping the permits on similar allotments within a watershed may be a particularly effective basis for analysis. When grouping allotments/permits the NEPA document must contain adequate site specific analysis within the geographic area to analyze the terms and conditions of all grazing permits being considered

for renewal. Our goal is to conduct sufficient analysis of the effects of grazing to support a rational decision on the grazing permit in the most expeditious and efficient manner possible.

Question 10: How do I comply with BLM Policy for Special Status Species, including those that are proposed and listed as threatened and endangered, when issuing grazing permits?

Answer: BLM policy requires that we seek conferencing with FWS and/or NMFS on any action that would adversely affect a federally proposed species or critical habitat, and to consult with them on any action that may affect federally listed species or critical habitat. BLM Manual 6840, *Special Status Species Management* and 43 CFR Subpart 4180 outline policy and regulatory requirements for the proper management of habitat on public lands that support Special Status Species. Special Status Species are those plants and animals that are: Listed as threatened or endangered under the Endangered Species Act (ESA); Proposed to be listed as threatened or endangered under the ESA; Candidates for listing as threatened or endangered under the ESA; State Listed; and BLM sensitive as identified by each State Director. Requirements for managing Special Status Species on public land are not limited to completing a Section 7 Consultation. See manual 6840 and IM 97-118 for guidance.

Question 11: Is Endangered Species Act Section 7 consultation required when a grazing permit is issued?

Answer: Whenever any discretionary action is undertaken by the BLM that may affect a listed (i.e., federally threatened or endangered) species or designated critical habitat Section 7 consultation must be completed. This is regardless whether the effects of the permit are beneficial or non-beneficial to the species or critical habitat. Therefore, all

permits need to be evaluated to determine if a May affect situation exists and subsequent consultation is necessary. In addition, if the effects of a permit May adversely affect a federally proposed species or critical habitat, BLM must seek to engage in ESA Section 7 conferencing as required by Bureau policy 6840.

Question 12: What kind of ESA section 7 consultation or conferencing is required for grazing permit renewal or issuance?

Answer: The type of ESA section 7 consultation required for grazing permit renewal will depend on the situation on your allotment. The consultation process is outlined by the BLM 6840 Handbook and 50 CFR part 402 (the consultation regulations). The State Office T&E Program Specialist can also provide more information. We recommend early and frequent contact with FWS and/or NMFS. They can help you determine the appropriate consultation requirements for your situation. As soon as possible, you should contact FWS/NMFS in writing to request the list of federally listed or proposed species that occur within the allotments being reviewed for permit renewal. You may also want to consider developing a consultation agreement with the FWS and/or NMFS as a way to spell out the procedures you will follow to ensure ESA compliance. In certain situations, you might want to discuss consultation issues with your regional solicitor's office.

Question 13: What are consultation agreements and how can they help me with the permit renewal process?

Answer: Consultation agreements can be very helpful to both the BLM and the FWS/NMFS in planning and prioritizing work when there are a number of consultations to complete in a short time frame. A consultation agreement will clearly establish mutual expectations about the consultation process by setting out the anticipated workload, setting priorities and timelines for completion of the biological assessment by the BLM and the biological opinions by the FWS and/or NMFS, and detailing how and when the agencies might work together on interdisciplinary, interagency teams to examine the proposed grazing permits. The Washington Office Fish, Wildlife and Forests Group can provide examples of consultation agreements if necessary.

If you determine that consultation or conferencing will be necessary for permit renewals for one or more allotments in your area, consider using a consultation agreement with the FWS and/or NMFS. You are strongly encouraged to contact the FWS and NMFS immediately to discuss consultation agreements if you anticipate that you will need to do more than a minimal amount of ESA section 7 consultation in your area. The FWS strongly encourages the BLM to consider the use of consultation agreements to help manage the workload associated with the permit renewal process.

Question 14: In deciding how to comply with NEPA, what are the circumstances under which I can rely on a categorical exclusion?

Answer: In some cases, a categorical exclusion may be applicable when there is a transfer of a preference. The Department of the Interior approved Categorical Exclusion (CX) list includes "transfers of grazing preference" (57 Fed. Reg. 10918 (3/31/92) and 516 DM 6)). If, however, any of the CX exceptions apply to a transfer (see BLM manual H-17990-1 appendix 4), the CX does not apply and you must complete an administrative determination showing that existing NEPA documentation is sufficient, or complete an environmental assessment or an EIS. (Examples of exceptions to CX include actions with adverse effects on wetlands, ecologically significant or critical areas, and on species listed or proposed for listing as threatened or endangered, or on critical habitat; with highly uncertain and potentially significant environmental effects; and actions which establish a precedent for future action. [In determining if the latter exception applies, please consult with the Regional Solicitor's Office.]

ATTACHMENT 3

Selected Laws Related to Processing Permits

Processing grazing permits requires compliance with a number of laws, and the analysis of compliance with applicable laws should be integrated to the extent possible. Integration of these analyses will not only allow us to work more efficiently, but will produce more comprehensive analyses.

The Fundamentals of Rangeland Health (43 CFR 4180.1) and the state-specific Standards for Rangeland Health and Guidelines for Livestock Grazing Management (S&Gs) provide a format for integrated analysis. The basic physical and biological elements of rangeland ecosystems, considered in 43 CFR 4180.1(a) through (c), have direct application to NEPA, the Endangered Species Act, the Clean Water Act, the Taylor Grazing Act and other laws related to processing permits. Furthermore, each state has incorporated their S&Gs into existing Land Use Plans, thereby making S&Gs a consideration in site-specific NEPA analyses. The following sections provide guidance on compliance with laws related to processing grazing permits.

A. National Environmental Policy Act (NEPA)

Guidance for ensuring NEPA compliance is found in *BLM Handbook H-1790-1 and 40 CFR 1500*. Guidance for plan conformance is found in *43 CFR 1610.5-3 and BLM Manual 1617*. This section provides additional guidance and suggestions related to NEPA analysis of grazing permit issuance and renewal.

1. When Existing NEPA Documentation is Sufficient

When existing NEPA documentation is sufficient to support your decision on a grazing permit, prepare an administrative determination as described in BLM Handbook H-1790-1, Chapter III, pp.1-2. You may follow the format provided in BLM Handbook H-1790-1, which lists conclusions that you must make. In making an administrative determination, you must provide adequate explanation and rationale for the conclusions that the existing NEPA document is sufficient.

For example, to explain how the proposed action (i.e., the decision on the grazing permit) is a feature of, or essentially the same as, the alternative selected and analyzed in the existing NEPA document, you should explain how the existing document identified and quantified the livestock grazing (kind of animals, numbers of animals, season(s) of use, etc.). To explain that there has been no substantial change in circumstances from those considered in the existing document, briefly describe how issues, concerns, or interests identified internally or externally or new information were addressed in the existing document. To explain how the impacts of the

proposed action are not substantially different from those analyzed in the existing document, briefly describe how the existing document analyzed the impacts of livestock grazing on applicable resources, such as soils, riparian values, water quality, T&E and wildlife habitat, and uses such as recreation. This should include consideration of how the existing document addressed the concepts in the fundamentals of rangeland health. Note that the fundamentals of rangeland health represent elements of the ecosystem, which would have been addressed in some form in the environmental consequences section of the existing document. In each case, provide specific citations to the existing document.

Each administrative determination will contain some rationale to support each of the conclusions that the existing NEPA document is sufficient. The amount of rationale will depend in part on the resource complexities and issues and concerns related to each particular permit. State Office grazing program leads and NEPA program leads can provide more guidance on the amount or level of rationale needed. If you cannot make the administrative determination that the existing NEPA document is sufficient, you should prepare an environmental assessment or environmental impact statement to support your decision on the grazing permit.

2. Environmental Assessment (EA)

An EA is a concise public document which has three defined functions: (1) it briefly provides sufficient evidence and analysis for determining whether to prepare an EIS or FONSI; (2) it aids agency's compliance with NEPA when no EIS is necessary, i.e., it helps to identify better alternatives and mitigation measures; and (3) it facilitates preparation of an EIS when one is necessary. An EA should contain a brief discussion of the need for the proposal, alternatives to the proposal, the environmental impacts of the proposed action and alternatives, and a list of the agencies and persons consulted.

The Purpose and Need for the Proposal

The proposal in this case is the issuance or renewal of a grazing permit. The purpose and need for the proposal should be tied to the goals and objectives of the land use plan. You should articulate which of the goals and objectives in the land use plan would be furthered by the proposed grazing permit. The purpose and need for the proposal will provide the eventual basis for the rationale for your selection among the alternatives considered in the EA. In reaching a decision on a grazing permit, you must consider which alternative best accomplishes the purpose and need for the proposal with acceptable impacts.

Range of Alternatives

The range of alternatives considered should reflect the scope of the action and should be sufficient to support a reasoned choice among grazing alternatives. Alternatives considered in

the EA should be designed to achieve the purpose and need for the proposal. You do not need to consider every available alternative, but the alternatives should address controversy or concern regarding site-specific grazing which was not addressed in the existing NEPA documents. You do not need to consider alternatives whose effect cannot be reasonably ascertained; alternatives whose implementation is deemed remote and speculative; alternatives which are infeasible, ineffective, or inconsistent with the basic policy objectives for the management of the area; or alternatives which are not significantly distinguishable from alternatives actually considered, or which have substantially similar consequences.

You must consider alternatives where there are conflicts related to grazing that have not been fully resolved in the land use plan. The range of alternatives may include (1) the no action alternative, where appropriate; (2) grazing consistent with the previous permit; and (3) one or more grazing alternatives.

Environmental Impacts

An EA must contain sufficient analysis to allow a reasoned choice among the alternatives and to determine whether the proposed action would have a significant impact on the environment, including the human environment. An EA analysis must focus on the relevant site-specific impacts, rather than amassing needless detail. While the discussion of these factors should be brief, it should also be sufficient to demonstrate a reasoned choice among the alternatives. For renewal or issuance of a grazing permit, an EA must analyze the site-specific conditions and the effects of livestock grazing that were not fully analyzed in existing NEPA documents.

To determine the scope of analysis in an EA, consider the resources and the uses on the allotment and ascertain whether there are unresolved conflicts regarding site-specific grazing which were not addressed in the existing NEPA documents. The extent of these types of controversies and concerns will help determine the scope of the EA analysis. The EA analysis should include consideration of the concepts in the fundamentals of rangeland health. Note that the fundamentals of rangeland health represent elements of the ecosystem, which would have already been addressed in some form in the environmental consequences section of existing NEPA documents, such as a grazing EIS, RMP EIS, or NEPA analysis for an allotment management plan. In most cases, the EA for a grazing permit should tier to this broader analysis in the existing NEPA documents.

In cases where there are few site-specific issues, the analysis in the EA may be brief and may rely heavily on the analysis in the existing EIS, which should be incorporated by reference. For example, where site-specific conditions on an allotment are consistent with the general analysis in existing NEPA documents, you only need explain why the site-specific conditions are consistent with the general analysis and incorporate that general

analysis by reference. Note that when incorporating by reference, the EA should specifically cite the relevant section of the existing EIS.

Attachment 3-3

Some site-specific analysis in the EA may be done based on existing information, rather than new field work. The extent to which EA analysis may require new field work will depend on the analysis in existing NEPA documents, the amount of existing information, and the issues and concerns related to the proposed grazing permit. Additionally, you must consider any new information relevant to the proposed grazing permit that may not have been considered in the existing EIS.

Agencies and Persons Consulted

List all the affected and interested individuals and groups with whom you have discussed the proposal, and any agencies or tribes with whom you have consulted. Discuss here how you have involved the public in the consideration of the proposal.

3. Environmental Impact Statement (EIS)

An EIS is required for renewal or issuance of a grazing permit if the grazing will have a significant impact that has not yet been fully analyzed in existing NEPA documents. The significance of impacts is determined by their context and intensity, as explained in 40 CFR 1508.27. Guidance on preparing an EIS is found in 40 CFR 1502 and BLM Handbook H-1790-1, Chapter 5.

In most cases, an existing EIS will provide a general analysis of the impacts of grazing to which a site-specific analysis may tier. If the *significant* impacts of grazing are fully analyzed in the existing EIS, and the site-specific analysis is tiered to that EIS, you do not need to prepare a new EIS. This determination should be documented in a Finding of No Significant Impact (FONSI) and supported by the analysis in an EA. Note that even if there are no *significant* impacts of a specific permit beyond those already analyzed, you must consider whether there are non-significant, site-specific impacts that still require analysis in an EA. Additionally, even when tiering, you must consider whether there is new information related to the effects of grazing that was not considered in the existing EIS.

If the site-specific analysis cannot be tiered to an existing EIS, and the grazing would have a significant impact on the environment, you must prepare an EIS for issuance or renewal of a grazing permit.

B. Endangered Species Act (ESA)

Refer to: *Manual 6840, Instruction Memorandums 97-118, 97-122 and 95-118 for Special Status Species Management and Endangered Species Act matters.*

Attachment 3-4

See also: U. S. Fish and Wildlife Service's *Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act*. March 1998

It is the policy of BLM to ensure that all actions authorized, funded, or carried out by BLM are in compliance with the Endangered Species Act (ESA). The Endangered Species Act contains several provisions that apply to the BLM. For this discussion however, we are focusing on the requirements for compliance with ESA under Section 7, Interagency Cooperation, and specifically the provisions regulating the consultation and/or conferencing requirements of the Act. States are to ensure that they are in full compliance with ESA. To accomplish this, the BLM shall:

- a. Evaluate all proposed actions to determine if individuals or populations of listed species or their habitat, including designated critical habitat, may be affected.
- b. Initiate consultation or conferencing with the U.S. Fish and Wildlife Service (FWS) / National Marine Fisheries Service (NMFS), including preparation of biological assessments, as appropriate, for those actions that may affect listed or proposed species or their habitats.
- c. Until consultation/ conferencing proceedings are completed, BLM shall not carry out any actions that would cause irreversible or irretrievable commitment of resources or reduce the future management options for the species involved.
- d. Ensure that actions will not reduce the likelihood of survival and recovery of any listed species or destroy or adversely modify their designated critical habitat.

BLM will also ensure that its management actions are consistent with conservation of federally proposed species, federal candidates and State-listed species. For more information on these species, consult *BLM Manual 6840*, and *Instruction Memorandums 95-118*.

In addition, in March of 1998, the Fish and Wildlife Service, in cooperation with the National Marine Fisheries Service, issued a handbook titled *Endangered Species Consultation: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act*. If your office does not have a copy of this handbook, please contact the Washington Office (230) for information on how to obtain a copy.

Completion of consultation for federally listed species and designated critical habitat or conferencing for proposed species and/or proposed critical habitat, will be a key step in the overall permit renewal process. If you have not done so already, you should contact FWS/ NMFS in writing as soon as possible to obtain a species list for the area(s) you will be reviewing for permit renewals. It is recommended that you send them a list of the species and/or designated critical habitat that you believe occur on BLM lands in the affected area and

request

Attachment 3-5

their input on its accuracy. This is the first step in the consultation process. In addition, it is imperative that once you have determined the number of allotments needing consultation (or conferencing for species proposed for listing), you should coordinate a schedule for completion of the consultations with the FWS/ NMFS office that has jurisdiction in your area. If you wait too long, the Services may have difficulty meeting your time frames. This is an avoidable situation with proper planning. With early planning, the Services may be able to provide technical assistance prior to initiating the consultation/ conferencing process, which can speed up the total time required to meet our legal obligations under section 7.

One precautionary suggestion is also warranted. Once you have completed a biological assessment and determined which allotments will not need to be included in a formal consultation, it is strongly recommended that you contact FWS/ NMFS and request written concurrence with your finding. This is not a mandatory requirement in the consultation process, however our experience has shown that completing this simple step can, in the long run, avoid a significant amount of additional work and delays for everyone involved in the process.

It is important to keep in mind that consultation/ conferencing with FWS/ NMFS can be approached in a variety of ways. For example, if you are uncertain if the action(s) you are considering may affect a listed species, you can initiate informal consultation with FWS/ NMFS. This is a process that includes all discussions and correspondence between BLM and the regulatory agency and is designed to assist BLM in determining if formal consultation is required. Similarly, the local FWS/ NMFS may have suggestions on approaches to efficiently complete the consultation process like programmatic consultations and/or batching of consultations (e.g. grouping allotments with similar affects). In some cases, you may want to consider entering into a consultation agreement with FWS/ NMFS. This is simply an agreement that outlines the process and procedures that both agencies have agreed to follow. This has been used successfully in many areas.

In addition, the FWS/ NMFS and BLM have developed and, have successfully implemented procedures, which have streamlined the consultation process. These approaches have been in use in Oregon, Idaho and portions of California for the past 2 years. Consult BLM Instruction Memo 97-122 for a detailed explanation of this process.

Finally, if they have not done so already, your State Office T&E Coordinator should contact the local FWS/ NMFS offices in your area and alert them to the potential and estimated workload associated with the permit renewal process. The key to successful implementation of section 7 is early and frequent communication with FWS/ NMFS.

C. Clean Water Act (CWA)

Federal Water Pollution Control Act. 33 U.S.C. Sec. 1251 *et seq.*

Compliance, or significant progress toward compliance, with state water quality standards is one of the Fundamentals of Rangeland Health (43 CFR. ' 4180.1(c)) and is addressed in by all states as part of their Rangeland S&Gs. Consequently, for all the public lands managed by BLM, you should determine those water bodies classified as water quality limited. If a stream (or other body of water) in an allotment is classified as water quality limited, you should discuss the issue in the NEPA documentation when you process an application for a permit, renewal, or transfer. In NEPA documentation, you should also consider whether or not livestock grazing may be a significant factor in contributing the water quality limitation (e.g. excessive temperature, sediment, etc.). (Note that *significance* is used here in the context of 43 CFR 4180, which is not equivalent to *significance* as defined in the regulations implementing NEPA, in which the *significance* of impacts determines if an EIS is required (See 40 CFR 1508.27)).

Water quality limited stream segments are those which a state or authorized Indian tribe has determined to be out of compliance with water quality standards. The standards may consist of numerical and/or narrative criteria, designated uses, and may include an anti-degradation policy. Each water quality standard applies to all or part of a specific stream segment. Each stream that is identified as water quality limited must be given a priority ranking by the state (State 303 d Priority List) or the tribe that sets the water quality standard. The state or tribe also must assign such a total maximum daily load (TMDL) consisting of the sum of the total allowable pollution from all point and nonpoint sources for each specific water quality criterion that is being violated.

For example, a state might assign a priority ranking of Class AA to certain waters within the boundaries of the state. The designated uses of Class AA waters could include protection of non-game fish and other aquatic life, including the necessary aquatic organisms in their food chain. In order to ensure that Class AA waters provide such protection, the state could set numerical criteria such as total nitrates as NO₃ mg/l, and/or specify narrative criteria such as diversity of aquatic species must be maintained. The final component of state's water quality standards for Class AA waters would be the anti-degradation policy, which could require that where the quality of the waters exceeds levels necessary to support propagation of fish, that water quality shall be maintained. Finally, the state would determine which Class AA waters, if any, are out of compliance with the water quality standards. For any waters that are out of compliance, the state designates those waters as water quality limited, and assigns a TMDL to those waters.

D. National Historic Preservation Act (NHPA)

National Historic Preservation Act (NHPA) 16 U.S.C. Sec. 470 *et seq.*

The NHPA is applicable to Federal undertakings, which include Federal permits. Thus, you must determine how issuing grazing permits could affect historic properties that are eligible for listing or are listed on the National Register of Historic Places. (Such properties include prehistoric cultural resources and traditional cultural properties.)

If grazing has the potential to adversely affect historic properties, you must engage in a consultation process to determine how to mitigate these effects. If you conclude that grazing would not impact historic properties because none are known to exist within the permit boundaries and the potential to find any is judged to be minimal, a simple statement to this effect is not enough. You must document the basis on which you reach the conclusion, including documentation of consultation with the State Historic Preservation Officer.

Consultation with the State Historic Preservation Officer (SHPO), must occur either according to 36 CFR Part 800 or following the BLM-SHPO protocol under the 1997 National Programmatic Agreement, whichever is applicable. Consult your respective State Office for assistance in determining which is applicable.

An EA or EIS prepared for issuing the permit needs to contain a summary discussion of the historic properties known to be in, or likely to be found in, the areas covered by the permit, any impacts of the terms and conditions of the permits to eligible properties, and a clear description of how the potential effects will be mitigated. Inclusion of this information in the EA or EIS will allow you to consider impacts of grazing on historic properties in your decision. In cases where the existing NEPA documentation is sufficient to support your decision on a grazing permit, you may combine the documentation of consultation with the SHPO with the administrative determination that the existing NEPA documentation is sufficient.

The NHPA review should begin with the appropriate land use plan(s) under which the permit is being authorized. For each permit area complete a literature search which covers previous cultural resource inventories in or near the allotment(s), (for example, for existing range improvements); the distribution of known cultural resources and the estimated potential for discovering unrecorded eligible historic properties in the allotment(s); and any particular known, fragile historic properties that may need physical protection from grazing-related impacts. (Guidance for literature search is contained in BLM Manual Section 8110.21A2)

Next, you should complete the appropriate type and amount of sampling or intensive field survey where sensitive areas are defined; where impacts are anticipated in areas with historic resource potential; or where BLM staff has information that historic properties are currently being disturbed. BLM Manual Section 8110. 21 B, C contains information on sampling and survey methods.

Finally, through the NHPA Sec. 106 consultation process, determine the appropriate means for protecting significant historic properties from adverse effects, perhaps through specific terms in the permits. This could include physical protection measures, mitigation of adverse effects through data recovery, or exclusion of areas from grazing use. See BLM Manual Section 8120 for information regarding the consultation process. Either the BLM-SHPO consultation protocol or 36 CFR 800 is applicable.

To facilitate addressing these issues, include a cultural resources specialist in the interdisciplinary team or process for evaluating a grazing permit.

Attachment 3-8

E. Wild and Scenic Rivers

Federal courts in Oregon have established the following regarding grazing in Wild and Scenic Rivers. Although this may not be the interpretation that courts in other states would take, the courts in Oregon have established a strong pattern that could be applied elsewhere.

The NEPA documentation for a river plan must include the impacts of grazing on river values and the environment, and, if these impacts are significant, an EIS is necessary. Reliance on the EIS accompanying a prior RMP or MFP will be insufficient if the document does not contain site-specific information concerning the impacts of grazing on river values (i.e. the RMP precedes river designation). Courts rejected the assertion that grazing pre-existing river designation is a continuous activity not requiring further NEPA analysis. Rather, the courts have held that the WSRA set forth affirmative duties for BLM and a river plan's decision to authorize grazing under WSRA involves distinctly different considerations from prior decisions to allow grazing.

Contrary to what 1982 Department of the Interior and Agriculture Joint Guidelines suggest, grazing and agricultural activities cannot necessarily continue at the levels practiced at the time of river designation. Rather, grazing and other uses can continue only where consistent with the WSRA mandate to "protect and enhance" the river's "outstandingly remarkable values" (ORVs). BLM may authorize river uses that do not "substantially interfere" with the public's enjoyment of river values, but *only* if such uses are *also* consistent with the "protect and enhance" standard. BLM is authorized to entirely eliminate grazing in areas where grazing is inconsistent with protecting and enhancing ORVs. Unless it is clearly stated in the statute designating a specific river, grazing is not grandfathered under the WSRA (despite some legislative history to the contrary). The fact that grazing impacts existed at the time of designation does not make them acceptable under the WSRA.

ATTACHMENT 4

REPORTING - PERMIT RENEWALS AND ASSESSMENT OF STANDARDS AND GUIDELINES

Monthly Report

Brief Narrative on progress in relation to Work Plan:

Number of grazing allotments scheduled this FY for assessment of S&Gs w/o expiring permit

Number of grazing allotments scheduled this FY for assessment of S&Gs w/expiring permit

Cumulative number of allotments reviewed for S&G conformance to date

Number of allotments reviewed for S&G conformance this fiscal year

Number of permits/leases expiring in FY 1999

Number of permits/leases expiring in FY 2000

Number of permits/leases analyzed and renewed

Number of permits issued under the FY 1999 Appropriations Grazing Rider

ISSUE: TOOLKIT FOR COMPLIANCE WITH ENVIRONMENTAL AND CONSERVATION LAWS

SUMMARY OF

ISSUE: The BLM must comply with Standards for Rangeland Health developed by the Resource Advisory Councils under 43 CFR 4180, and environmental and other conservation laws, such as the Endangered Species Act, in the renewal of grazing permits or leases. Compounding the work for fiscal year 1999 is a large number of permits or leases that expire during the year. The renewal process must be merged with an ambitious schedule for assessment of rangeland health on grazing allotments.

BACKGROUND: This guidance document is a follow up to the Framework for reviewing, assessing and renewing grazing permits or leases which was recently issued. The Instruction Memorandum provides processes and procedures to assist the State Directors in their endeavors to ensure that grazing practices on allotments adequately comply with applicable environmental, conservation and preservation laws before they are renewed. The guidance provides a national strategy approach for completing permit and lease renewals while merging the job with the Standards for Rangeland Health Assessment effort to enhance efficient utilization of work force and resources. Over the long-term the schedule for assessing standards for rangeland health will work to smooth-out the permit renewal schedule and eliminate the abnormal bulge. Fiscal year 1999 presents an exceptional challenge for completing the renewal process because there are about 4,500 expiring permits, and a bulge more than double the normal rate.

RECOMMENDED: The attached Policy details the procedures or process that will assist Field Offices as they work to ensure permits or leases are in compliance with the environmental, conservation and preservation laws while considering the multiple land uses in balancing the competing resource values and merging workloads to complete assessments of land health. In addition, a help line via an e-mail box is being established to provide timely answers and assistance.

CONSTITUENCY

POSITION: Environmental groups believe the BLM does not routinely complete site-specific environmental assessments of the effects of grazing at the allotment level prior to renewing grazing permits. They want an environmental and land use planning review that eliminates or reduces grazing in those areas where livestock grazing is deemed to be out of balance with competing resource values.

Commodity groups believe the Comb Wash decision has introduced grave uncertainty into the grazing permit renewal process.

The Western Congressional Delegation is concerned that there will be delays in completing required compliance reviews and in renewing grazing permits.

State and Federal Agencies are concerned about the effect on their programs and budget commitments.